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No. 08-1420

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

THE COALITION OF WATERSHED TOWNS, THE TOWN OF HUNTER, NEW YORK, THE TOWN OF ROXBURY, NEW YORK, AND THE TOWN OF HAMDEN, NEW YORK,

Petitioners,

-v.-

THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, THE NEW YORK STATE DEPARTMENT OF HEALTH, RICHARD M DAINES, M.D., AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF HEALTH, AND THE CITY OF NEW YORK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF NEW YORK

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STATEMENT

All public water systems in the nation are regulated by EPA pursuant to the Safe Drinking Water Act ("SDWA"). 42 U.S.C. § 300f *et seq.* Under this authority, in 1989, EPA adopted the Surface Water Treatment Rule ("SWTR"), which requires public water suppliers relying on surface water to filter that water, unless certain objective and subjective "filtration avoidance criteria" are satisfied. *See* 40 C.F.R. § 141.71. The objective criteria require that source water meet the turbidity and fecal coliform standards of the SWTR, that there be no source-related violations of the Coliform Rule, and that there be no waterborne disease outbreaks. *See* 40 C.F.R. § 141.71(a). The subjective criteria require that the public water supplier maintain a watershed control program that minimizes the potential for contamination of the water supply. *See* 40 C.F.R. § 141.71(b). To meet this criterion, a public water supplier must demonstrate that it either owns the lands within the water supply watershed or has adequate control over all land use activities in the watershed that could give rise to contamination of the water supply. If a public water supplier meets these criteria, it can obtain a waiver of the filtration requirement, known as a filtration avoidance determination or "FAD." *See* 40 C.F.R. § 141.71.

EPA may delegate primary enforcement responsibility (or "primacy") for rules promulgated under the Safe Drinking Water Act to states which have adopted drinking water regulations that are at least as stringent as the federal rules. 42 U.S.C. § 300g-2(a); 40 C.F.R. § 142.10. In 1997, EPA delegated primacy for the SWTR to the New York State Department of Health for all surface water sources within New York State except the Catskill/Delaware System, operated by the City of

New York. The State and EPA agreed that EPA would "retain SWTR primacy for New York City's Catskill/Delaware water supply system until May 15, 2007." 62 Fed. Reg. 41,049 (July 31, 1997). EPA's announcement of the transfer of primacy explained that the delay in the effective date was to allow EPA "to provide the appropriate oversight of New York City's implementation of the conditions of a Filtration Avoidance Determination issued on May 6, 1997," and also to "allow time for [the New York State Department of Health] to strengthen its oversight program for New York City's Catskill/Delaware system." *Id.* EPA later delayed the effective date of the primacy transfer by letter dated April 25, 2007, and primacy ultimately transferred to the New York State Department of Health on September 26, 2007.

The City of New York ("the City"), through its Department of Environmental Protection, operates a public drinking water supply system located in the Catskill region of upstate New York as an unfiltered water supply system under a series of Filtration Avoidance Determinations from EPA dating back to 1993, referred to as the Catskill/Delaware system. *See* Pet. Supp. App. at 4-6.[1] To ensure the quality of this drinking water, the City has undertaken a comprehensive watershed protection program, consisting of three main elements: (1) a Land Acquisition Program, through which the City purchases land from willing sellers to protect undeveloped, environmentally sensitive watershed lands; (2) a set of extensive Watershed Rules and Regulations, developed by the City and authorized under the New York Public Health Law, N.Y. Pub. Health Law § 1100(1)

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[1] "Pet. Supp. App." refers to the Supplemental Appendix to the Petition for a Writ of Certiorari.

(McKinney 2002), that apply to land uses within the Watershed that have the potential to affect water quality;[2] and (3) a suite of Watershed Protection and Partnership Programs funded by the City in areas such as wastewater infrastructure and control equipment, stormwater control, and management of agricultural runoff. *See* Pet. Supp. App. at 25-77.

These programs make up the City's watershed protection program, most recently approved by the EPA in consultation with the New York State Department of Health in a FAD issued in July 2007. *See* Pet. Supp. App. at 1. The basic structures of these programs were also set forth and agreed to by the City, State, EPA, upstate communities (including the Petitioners here), and various environmental groups in a 1997 Watershed Memorandum of Agreement (MOA), which established the institutional framework needed to implement the range of protection programs identified as necessary by the City, the State, and EPA to maintain filtration avoidance for the City's Catskill/Delaware system. *See* Pet. Supp. App. at 5-6. Together, the Watershed Regulations, the Land Acquisition Program, and the numerous partnership programs allow the City to adequately control all human activities within the watershed with the potential to adversely affect water quality, thus meeting the requirements of the SWTR. *See* Pet. Supp. App. at 19-21.

Petitioners, three municipalities located within the City's watershed and an association representing those and other watershed

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[2] The Watershed Rules and Regulations are found at N.Y. Comp. Codes R. & Regs. tit. 10 Part 128 (2007) and R. City of N.Y. tit. 15, Chap. 18 (2008).

communities, brought a petition for review in the Second Circuit to challenge EPA's July 2007 determination, made in consultation with the New York State Department of Health, that the City's long-term watershed protection program for its Catskill/Delaware water supply meets the requirements of the Surface Water Treatment Rule. Petitioners also sought to nullify EPA's decision to delay the transfer of primacy to the State until September 2007. The Second Circuit held that Petitioners could not establish Article III standing to bring the petition because a favorable decision on the petition could provide only speculative relief, and any alleged injury suffered by Petitioners would not be redressed by a favorable decision. *Coalition of Watershed Towns v. EPA*, 552 F.3d 216, 217 (2d Cir. 2008).

REASONS FOR DENYING THE PETITION

Petitioners have not identified any circuit split, novel issue of federal law, or other reason to invoke this Court's jurisdiction. Contrary to Petitioners' claim, the decision of the Second Circuit does not impose a new standing requirement, but rather is in line with this Court's established standing jurisprudence. And in any event, Petitioners' claims under the Safe Drinking Water Act and its implementing regulations are without merit, as EPA's interpretations of the relevant statutory and regulatory provisions are reasonable and entitled to substantial deference.

1. The petition presents no conflict with any decision of this Court nor any split of authority among the circuits. While case law interpreting EPA's primacy regulations is sparse, those cases generally recognize EPA's broad discretion to interpret and administer the primacy process and the complex regulatory regime governing drinking

water supplies. *See, e.g., Nat'l Wildlife Federation v. EPA*, 980 F.2d 765, 770 (D.C. Cir. 1992); *Nat'l Wildlife Federation v. EPA*, 925 F.2d 470, 474-76 (D.C. Cir. 1991) (discussing EPA's discretion over the mechanics of primacy grant and withdrawal). This is consistent with the clear instruction of this Court that an "agency's interpretation of the meaning of its own regulations is entitled to deference 'unless plainly erroneous or inconsistent with the regulation.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 127 S. Ct. 2518, 2537-38 (2007) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Petitioners do not cite a single case offering a contrary interpretation of the primacy regulations.

2. Next, Petitioners are incorrect when they argue that the Second Circuit imposed a new standing requirement on them. Rather, the decision is in line with this Court's established standing jurisprudence. Although Petitioners seek to invalidate EPA's decision to delay the effective date of the transfer of primacy to the State, the actual remedy they desire is an additional level of review of the City's program by the New York State Department of Health. *See* Pet. Br. at 16-21 (identifying an injury to Petitioners' "right" to have the State issue any FADs for the Catskill/Delaware System after May 15, 2007, subject to environmental review under state law). But as the Court explained in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), a case in which the relief that would redress the injuries complained of required action from non-party agencies, "it is entirely conjectural whether the non-agency activity that affects [petitioners] will be altered or affected by the agency activity that they seek to achieve." *Lujan*, 504 U.S. at 571. The Second Circuit properly concluded that Petitioners had failed to

demonstrate a redressable injury, especially where, as here, New York State Department of Health did not object to the delay in primacy transfer, was consulted on EPA's determination to approve filtration avoidance, and intervened as a respondent to help defend EPA's actions. *See Coalition of Watershed Towns*, 552 F.3d at 217 (citing *Lujan* and *Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83 (1998)).

Petitioners' claimed procedural right, relying on *Massachusetts v. EPA*, 549 U.S. 497 (2007), also fails to give them standing. The Court in *Massachusetts v. EPA* stated that "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests' ... 'can assert that right without meeting all the normal standards for redressability and immediacy.'" 549 U.S. at 517-18 (citing *Lujan*, 504 U.S. at 572). However, the Court still required that a litigant "vested with a procedural right" show that "there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant" in order to establish standing. *Id.*, 549 U.S. at 518. Petitioners have not made any comparable showing of redressability in the case at bar.

In addition, here, the procedural right Petitioners claim is the ability to "challenge *any* EPA action made under the SDWA." Pet. Br. at 30 (emphasis in original). But the right to challenge an agency action is not the "concrete interest" needed to confer standing even when invoking a procedural right; rather, it is simply a generalized and "abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." *Lujan*, 504 U.S. at 573. This is plainly insufficient to establish Article III standing.

3. Finally, Petitioners' claims that EPA's delay in transferring primacy to New York State Department of Health constituted an improper withdrawal of primacy and that the City's watershed protection program does not satisfy the requirements of the SWTR are entirely without merit.

The SDWA affords EPA wide discretion to establish the procedures and criteria for deciding when to grant and withdraw primacy. *Nat'l Wildlife Federation v. EPA*, 980 F.2d at 770. Reflecting the practical realities involved with effective safe drinking water enforcement, the primacy procedural regulations allow the agency substantial leeway to address primacy administration in informal ways. *See Nat'l Wildlife Federation v. EPA*, 925 F.2d at 474-76 (discussing EPA's discretion over the mechanics of primacy grant and withdrawal). Moreover, "[i]nterpretation of the procedural regulations pertaining to the grant, modification, and withdrawal of primacy ... are matters within the [EPA's] expertise, and entitled to deference." *HRI, Inc. v. EPA*, 198 F.3d 1224, 1241 (10th Cir. 2000). Petitioners' claim that the delay in transfer of primacy was improper fails in light of the well established deference owed to EPA in administering its own regulations.

Petitioners' argument is also based on an incorrect premise, i.e., that the New York State Department of Health had received primacy as of May 15, 2007. Although EPA's original decision approving primacy listed May 15, 2007 as the effective primacy transfer date for the Catskill/Delaware system, intervening events cannot be ignored. On April 25, 2007 the EPA further delayed the effective date of primacy in order to give the State additional time to pass legislation authorizing the administrative penalties

required under the SDWA, also allowing the agency to complete work on the 2007 FAD. Pet. App. B at 6a-8a.[3] EPA's decision to delay was reasonable under the circumstances and fully permissible under the substantial administrative flexibility inherent in the primacy regulations.

Similarly, Petitioners' arguments against the City's watershed protection program also ignore the substantial deference owed to EPA's interpretation of the Surface Water Treatment Rule. The Safe Drinking Water Act was enacted to ensure that public water supply systems meet minimum national standards for the protection of public health. Nat'l Wildlife Fed'n v. EPA, 980 F.2d at 768. Pursuant to the statute, EPA must establish primary drinking water regulations specifying treatment techniques or maximum levels of contaminants that may have an adverse effect on the health of consumers. 42 U.S.C. § 300g-1.

As required by the 1986 amendments to the SDWA, in 1989 EPA promulgated the Surface Water Treatment Rule. 54 Fed. Reg. 27486 (June 29, 1989). The Rule requires all public water supply systems supplied by unfiltered surface water sources, such as the City's system, either to provide filtration or to meet certain objective and subjective filtration avoidance criteria and provide specified treatment techniques. See 40 C.F.R. § 141.71. The SWTR's purpose is to provide protection "against the potential adverse health effects of exposure to Giardia lamblia, viruses, Legionella, and heterotrophic bacteria, as well as many other pathogenic organisms" found in surface

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[3] "Pet. App." refers to the Appendix annexed to the Petition for a Writ of Certiorari.

water. 52 Fed. Reg. 42178 (Nov. 3, 1987); see also 54 Fed. Reg. 27486, 27488 (June 29, 1989).

One of the Rule's filtration avoidance criteria requires a public water system to maintain a "watershed control program" that minimizes the potential for microbiological contamination. 40 C.F.R. § 141.71(b)(2) ("The public water system must maintain a watershed control program which minimizes the potential for contamination by Giardia lamblia cysts and viruses in source water."). The watershed control program is to be evaluated based on its adequacy in achieving this goal, considered in light of several factors, which include "the comprehensiveness of the watershed review; the effectiveness of the system's program to monitor and control detrimental activities occurring in the watershed; and the extent to which the water system has maximized land ownership and/or controlled land use within the watershed." Id. The regulations also set out the "minimum" requirements for a watershed control program: "(i) Characterize the watershed hydrology and land ownership; (ii) Identify watershed characteristics and activities which may have an adverse effect on source water quality; and (iii) Monitor the occurrence of activities which may have an adverse effect on source water quality." Id. Thus, the regulations focus on the program's effectiveness in minimizing contamination, and do not dictate the ways in which this should be accomplished.

Petitioners, relying on a single excerpt from the filtration avoidance regulations, erroneously argued below that a successful watershed control program can only be achieved through land ownership and/or agreements with all individual landowners within the watershed. That provision states, "The public water system must demonstrate through ownership and/or written agreements with

landowners within the watershed that it can control all human activities which may have an adverse impact on the microbiological quality of the source water." 40 C.F.R. § 141.71(b)(2). Petitioners' narrow reading of the regulatory language, in isolation from the rest of the filtration avoidance regulations, ignores the SWTR's focus on the practical effectiveness of watershed control programs. The regulations, read as a whole, make clear that qualifying for filtration avoidance depends on having a program that is demonstrably effective in minimizing the potential for microbiological contamination in the source water, through a program that controls land use within the watershed, as the City's program does. EPA employed this view of the regulations in approving the FAD, and this interpretation of the SWTR is entitled to considerable deference. See Auer, 519 U.S. at 461.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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